(1)

91-858

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1991

UNITED STATES OF AMERICA,

Respondent,

v.

AMERICAN BANKERS INSURANCE COMPANY
OF FLORIDA by ROGER D. ROBERTS
(Power of Attorney), Surety,

Petitioner.

WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Harry F. Bosen Jr.
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Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Did the district court judge demonstrate prejudicial bias in his derogatory statements regarding the Petitioner and other bail bondsmen at the hearing on the issue of remission of a forfeited bail bond?

2. Did the district court err in refusing to remit to the Petitioner any portion of a $75,000 bail bond in view of the fact that the defendant appeared for trial and was convicted?

LIST OF PARTIES

The following were parties to the proceeding in the Fourth Circuit Court of Appeals:

United States of America

American Bankers Insurance Company of Florida

Roger D. Roberts

George Lee Kosko

American Bankers Insurance Company of Florida is a subsidiary of American Bankers Insurance Group, Inc. The following companies are subsidiaries of American Bankers Insurance Company of Florida: ABIC Premium Finance Co., American Bankers General Agency, Inc., Bankers Insurance Company Limited, Caydeaux Group, Ltd., Financial Exchange, Inc., and Roadgard Motor Club, Inc. (Canada).

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OPINIONS BELOW

The initial ruling of the district court denying the remission of any portion of the forfeited bond was rendered on March 28, 1988 and appears in the Appendix at A-4. The final decision of the district court denying the motion to reconsider was issued on August 17, 1989 and appears in the Appendix at A-1. The ruling of the United States Court of Appeals for the Fourth Circuit, affirming the district court, was issued on August 19, 1991 and appears in the Appendix at A-9. The Fourth Circuit's denial of the Petition for Rehearing with Suggestion for Rehearing In Banc was filed on September 16, 1991 and appears in the Appendix at A-24.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The final disposition of this case below was the Fourth Circuit's denial of the Petitioner's Petition for Rehearing with Suggestion for Rehearing In Banc on September 16, 1991. The Fourth Circuit had affirmed the decision of the district court in an opinion issued on August 19, 1991.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fifth amendment to the United States Constitution states in pertinent part:

> No person . . . shall be deprived of life, liberty, or property, without due process of law[.]

28 U.S.C. § 455(a) states:

> Any justice, judge, or magistrate of the United States

> shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Fed. R. Crim. P. 46(e)(2) and (4) state:

> (2) Setting Aside. The court may direct that a forfeiture be set aside in whole or in part, upon such conditions as the court may impose, if a person released upon execution of an appearance bond with a surety is subsequently surrendered by the surety into custody or if it otherwise appears that justice does not require the forfeiture.
>
> . . . .
>
> (4) Remission. After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

STATEMENT OF THE CASE

This case arises from the forfeiture of a $75,000 surety bond ordered by the United States District Court for the

Western District of Virginia on July 10, 1987, when defendant George Lee Kosko became a fugitive from justice prior to his pending criminal case. The bond had been provided by American Bankers Insurance Company of Florida through its agent, Roger D. Roberts. Under an indemnification agreement, Roberts was required to indemnify American Bankers against any forfeiture losses on such surety bonds, and thus he personally suffered the loss of the amount of the forfeited bond. Roberts made substantial efforts to find Kosko and, as was recognized by the government, cooperated with the government in its efforts to locate and capture Kosko. Kosko surrendered to authorities on January 24, 1988, one day prior to his scheduled trial. After a one-day continuance, Kosko was tried and convicted, and received a sentence of 22 years in

prison. The conviction and sentence were affirmed by the Fourth Circuit. See United States v. Kosko, 870 F.2d 162 (4th Cir. 1989).

Following Kosko's appearance at trial, American Bankers and Roberts filed a Motion for a Bond Refund under Fed. R. Crim. P. 46(e)(4). This motion was initially denied on March 28, 1988 by the district court despite the fact that the government estimated that its expenditures in attempting to recapture Kosko totaled only one-third of the amount of the forfeited bond and despite the fact that Roberts had made substantial efforts to locate Kosko. American Bankers filed a Motion to Reconsider and Rehear, but on August 17, 1989 the court entered a final order denying the motion and again refused to remit any of the forfeited bond.

Significantly, during the second hearing on the issue of remission on July 14, 1989, the district court judge made numerous statements evidencing a hostile personal position with regard to Roberts and other bail bondsmen. Interrupting counsel for Roberts and American Bankers as he stated that bondsmen perform a service in that they permit a defendant, who is presumed to be innocent, to be out of jail to assist in the preparation of his case for trial, the district court judge stated:

> But I don't look on it as a service. Maybe I'm prejudiced against these bonding companies because it's these people that can't afford to pay these sums that get hooked with these bonding companies. . . .
>
> I have no sympathy for these bondsmen at all and if I could get them out of this court, they wouldn't be in this court at all. If I could. So, I mean you can talk about the service they perform, but I

> think they are an evil on society. That's my opinion.

(App. at 26-27.)

A timely appeal was filed with the Court of Appeals for the Fourth Circuit. However, the Fourth Circuit affirmed the ruling of the district court in an unpublished, per curiam opinion issued on August 19, 1991. The Petitioner's Petition for Rehearing with Suggestion for Rehearing In Banc was denied on September 16, 1991.

ARGUMENT

THE COURTS BELOW ERRED IN DENYING THE REMISSION OF ANY PORTION OF THE FORFEITED BOND.

A. The District Court Judge Demonstrated Bias In His Comments Regarding The Petitioner And Other Bail Bondsmen.

In the course of the hearing on the issue of remission of all or a portion of

the forfeited bond, the district court judge made numerous statements evidencing a personal bias against the Petitioner, Roger Roberts, which far exceeded the bounds of any permissible comment. Because of the extreme nature of the judge's statements, the Fourth Circuit's inexplicable failure to find that the statements constituted prejudicial bias, and the clear conflict between the ruling below and the decisions of other courts of appeal and other Fourth Circuit decisions, this Court must grant this Petition for Certiorari.

The words of the district court judge demonstrated a clear and unmistakable personal bias and predisposition against Roberts which inevitably affected the court's decision to deny the remission of any portion of the $75,000 bond. In fact, the comments of the district

court judge were remarkably extreme in their hostility to a group of individuals and companies who perform a service to those appearing before the criminal courts and whose operation is sanctioned by the State of Virginia. See Va. Code Ann. § 19.2-152 (1990).

In open court, in a proceeding to determine the right of a bail bondsman to the return of a forfeited bond, the judge stated: "Maybe I'm prejudiced against these bonding companies[.]" The judge next described bondsmen as "an evil on society" and stated his desire to put bondsmen out of business, asserting that

> I have no sympathy for these bondsmen at all and if I could get them out of this court, they wouldn't be in this court at all.

(App. at 26-27.)

It can hardly be disputed that any individual, appearing as a party in a

case before a judge who uttered these words about him, would not believe that the merits of his case would be judged in a manner free from bias. In this case, the effect of the bias was obvious, for by his ruling the district court judge succeeded in accomplishing precisely what his intemperate remarks indicated that he wanted to do: by refusing remission of any part of the forfeited bond, he put Roberts in such a weakened financial position that he no longer can or will provide bail bonds in the federal court system. In short, the district court judge put Roberts out of business in federal court and thereby got him "out of this court."

In its ruling, the Fourth Circuit recognized that claims of bias are to be reviewed under an objective standard. As noted by the court in In re Beard, 811

F.2d 818, 827 (4th Cir. 1987), quoting 28 U.S.C. § 455(a), the test for determining when potential bias requires recusal of a judge is when "'his impartiality might reasonably be questioned:'"

> The inquiry is whether a reasonable person would have a reasonable basis for questioning the judge's impartiality, not whether the judge is in fact impartial.

Accord Rice v. McKenzie, 581 F.2d 1114, 1116 (4th Cir. 1978).

Inexplicably, however, the Fourth Circuit reached the conclusion that the remarks of the district court judge could not lead a reasonable person to question the judge's impartiality. In an attempt to put the remarks "into context," the court claimed that the judge subsequently softened the effect of his diatribe against bail bondsmen by stating that "he may get it [the bond] back, but not because that [sic] he's doing a valuable

service for the public" (App. at 17-18). It is more likely that a reasonable person might believe that the judge made this subsequent remark in a vain and belated attempt to disguise the bias which he had already revealed in his repeated and gratuitous condemnations of bail bondsmen.

The decision below is in conflict with the prior decisions of the Fourth Circuit and with decisions from other courts of appeals. For example, in the much-publicized decision in United States v. Bakker, 925 F.2d 728 (4th Cir. 1991), the Fourth Circuit faced the same issue of whether the appearance of personal bias on the part of the district court judge should invalidate a ruling of that judge. In Bakker, the alleged bias was revealed in remarks at the defendant's sentencing hearing, when the judge stated

that the defendant "had no thought whatever about his victims and those of us who do have a religion are ridiculed as being saps from money-grubbing preachers or priests." Id. at 740. Because the court of appeals felt that the statement revealed that these words were "too intemperate to be ignored," id. at 741, and that sentencing may have been impermissibly influenced by the personal principles of the judge and thus may have been violative of due process, the court ordered that the defendant be resentenced by a different judge.

If the relatively moderate words of the judge in Bakker, uttered after the verdict of guilty had been rendered, were too intemperate to be ignored, this Court must find that in this case the judge's mid-hearing announcement of his prejudice against one of the parties appearing be-

fore him, his characterization of that party as "an evil on society," and his expressed desire to "get [bondsmen] out of this court" were similarly extreme and indicative of prejudice amounting to a deprivation of due process.

Cases from other circuits confirm the need for consideration of this case. For example, in Gardner v. A.H. Robins Co., 747 F.2d 1180 (8th Cir. 1984), the trial judge made a number of negative comments about the defendant and its officers during a pretrial settlement proceeding. In essence, the judge accused the directors of the company of violating ethical precepts and stated that their lawyers had not brought honor to their profession. In agreeing that the remarks violated the due process rights of the persons who had been criticized in court,

the court noted the special responsibilities of district court judges:

> The judicial branch of the government is not and should never become an advocate for private causes. A federal district judge holds one of the most powerful and respected offices in this country. The judge exercises a power over a person's life, liberty, and property, legally restrained only by the review processes of a court of appeals and the Supreme Court of the United States.

Id. at 1194 (footnote omitted).

In a similar case, Roberts v. Bailar, 625 F.2d 125 (6th Cir. 1980), the Sixth Circuit noted that the provisions of § 455(a) are self-executing and that judges must observe them sua sponte. After examining the legislative history of the 1974 amendment to § 455(a), the court concluded that "[e]ven where the question is close, the judge whose impartiality might reasonably be questioned must recuse himself from the trial." Id.

at 129. Following this principle, the court ruled that the trial judge erred in not recusing himself after making favorable comments concerning the character of the defendant at a pretrial hearing. Accord Home Placement Service, Inc. v. Providence Journal Co., 739 F.2d 671, 676 (1st Cir. 1984) (bias was established by trial judge's favorable pretrial comments concerning one of the parties; "a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street").

In short, the court below in this case did not correctly measure the effect of the district court judge's words on the appearance of injustice and, in fact, on the outcome of the case. This Court has emphasized that district court judges have the duty "to promote confidence in

the judiciary by avoiding even the appearance of impropriety whenever possible." Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S. Ct. 2194, 2205 (1988). The grossly intemperate remarks of the judge in this case concerning a party appearing before him not only constituted the appearance of impropriety, but in fact denied the Petitioner the right to a fair trial before a tribunal, free from bias or prejudice, guaranteed by the due process clause of the fifth amendment. See In re Murchison, 349 U.S. 133, 136-37 (1955).

Because the decision below resulted in a deprivation of the Petitioner's right to an impartial hearing, is in conflict with the rulings of other courts of appeals, and represents a departure from accepted norms in judicial proceedings,

this Court must exercise its power to review the ruling of the Fourth Circuit.

B. The District Court Erred In Refusing To Remit Any Portion Of The Forfeited Bond.

The decision of the court of appeals to affirm the district court's denial of remission of any portion of the forfeited bond is contrary to established precedent of the Fourth Circuit and other courts of appeals. In its ruling, however, the court made no attempt to explain its deviation from these decisions.

In United States v. Kirkman, 426 F.2d 747 (4th Cir. 1970), for example, the court remitted $22,500 of a $25,000 bond which had been ordered forfeited after the defendant failed to appear on his trial date. In doing so, the court held that the district court had abused

its discretion in refusing to return the bond to the sureties. While emphasizing that forfeiture and remission are matters within the sound discretion of the district court judge, the court determined that the circumstances did not justify the enforcement of the entire forfeiture as to the sureties because the defendant was subsequently tried, convicted, and sentenced. In words particularly relevant to this case, the court concluded: "We think that forfeiture ought to bear some reasonable relation to the cost and inconvenience to the government of regaining custody and again preparing to go to trial." Id. at 781.

Similarly, in Accredited Surety & Casualty Co. v. United States, 727 F.2d 368 (4th Cir. 1983), the court held that it was appropriate to order the remission of $50,000 of the forfeited $75,000 bond.

In that case the defendant was a fugitive from a proceeding in South Carolina and was arrested in Florida while attempting to flee to the Bahamas. The court emphasized again that the amount of a forfeiture should bear some reasonable relation to the cost and inconvenience to the government and the courts. Accord Jeffers v. United States, 588 F.2d 425 (4th Cir. 1978) (remission of portion of forfeited bond ordered when defendant was killed in an airplane crash while a fugitive; amount based on government's calculations of its expenditures in attempting to arrest defendant).

Decisions from other courts of appeals which have reached contrary results on similar facts include Appearance Bond Surety v. United States, 622 F.2d 334 (8th Cir. 1980), in which the Eighth Circuit ordered the remission of $99,000 of

a $100,000 bond, reversing the district court order which remitted only $75,000 of the bond. Citing United States v. Kirkman, supra, for the position that a forfeiture ought to bear some reasonable relation to the cost and inconvenience to the government of regaining custody, the court found that although the defendant had fled the jurisdiction of the court on the day of his sentencing, he had been apprehended with minimal delay and was sentenced the following day, and thus the inconvenience to the government did not justify a $25,000 forfeiture. See also United States v. Minor, 846 F.2d 334 (9th Cir. 1988) (remission of $65,000 of $75,000 forfeited bond ordered); United States v. Ramos, 672 F. Supp. 1427 (S.D. Fla. 1987) (court ordered remission of $93,000 of $100,000 bond, relying on United States v. Kirkman, supra, for rule

that forfeited bond must bear a relationship to the cost to the government in regaining custody).

The significant factors in this case are the conviction of Kosko, the amount of the government expenditures, and the assistance provided by the sureties in seeking the return of Kosko. The conviction of Kosko demonstrates conclusively that the government suffered no actual prejudice by virtue of the breach of the bond conditions. The guilty plea of Kosko ensured that the government was placed in precisely the best position it could have been in had Kosko not originally fled from justice. Indeed, all other codefendants pleaded guilty and assisted the government in its prosecution of Kosko, thus ensuring Kosko's conviction. Accordingly, the government was spared the expense of prosecuting Kosko's

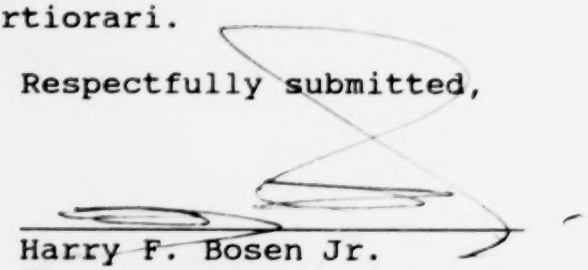
codefendants. Further, the facts in this case show that the government expended less than one-third of the amount of the bond in seeking Kosko. Moreover, the government confiscated and forfeited at least $31,000 in currency and other items as a result of Kosko's arrest. Thus, the government cannot argue that retention of the entire bond is necessary to cover its costs. In fact, even after counting the expenses given by the government, it has suffered little or no pecuniary loss by virtue of Kosko's failure to follow the conditions of his bond. Finally, the facts show that the sureties in this case provided substantial assistance in seeking Kosko's return and capture, an important consideration in weighing the equities with regard to remission of a forfeited bond. See United States v. Mizana, 605 F.2d 739 (4th Cir. 1979).

The Fourth Circuit's evaluation of these facts and principles was simply erroneous, particularly in its conclusion that the government's costs bore a reasonable relationship to the amount of the bond. The unfairness of the ruling and its conflict with the prior decisions of the Fourth Circuit and other courts of appeals bring this case within the category of cases which requires review by this Court.

CONCLUSION

For all of the foregoing reasons, the Petitioner, Roger D. Roberts, requests this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,



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IN THE
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UNITED STATES OF AMERICA,

Respondent,

v.

AMERICAN BANKERS INSURANCE COMPANY
OF FLORIDA by ROGER D. ROBERTS
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Petitioner.

WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

AUG 17, 1989

UNITED STATES OF AMERICA, Plaintiff,	)	CRIMINAL ACTION NO.
v.	)	87-00048-R
GEORGE LEE KOSKO, Defendant.	)	O R D E R

This case is before the Court on the motion of Roger D. Roberts for refund of the bond executed by Roberts and forfeited to the United States when defendant Kosko fled the Court's jurisdiction. The Court has heard evidence on the motion and the parties have presented oral argument. Remission of forfeited bonds is within the discretion of the Court. United States v. Kirkman, 426 F.2d 747, 751 (4th Cir. 1970). The Court finds that the defendant Kosko willfully fled the Court's jurisdiction and concealed

himself from the authorities. The Court further finds that the actual expenses incurred by the Government in attempting to locate Kosko and return him to the jurisdiction were substantial. Perhaps of even greater consequence, the Government expended a great deal of manpower, both in the form of investigative agents and in support staff, in the search for Kosko. As a result, the Court concludes that the circumstances in this case require the continued enforcement of the forfeiture and it is hereby

O R D E R E D

that Roberts' motion for bond refund shall be and hereby is DENIED.

The Clerk of Court is directed to send certified copies of this order to counsel for Roberts and to all counsel of record.

ENTER: This 17th day of August, 1989.

_____/S
Chief U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

UNITED STATES OF AMERICA, Plaintiff	)	CRIMINAL ACTION NO. 87-00048(R)
v.	)	
GEORGE LEE KOSKO and AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA by ROGER D. ROBERTS (Power of Attorney), Surety, Defendants	)	MEMORANDUM OPINION By James C. Turk Chief U. S. District Judge

This case is before the Court on the motion of American Bankers Insurance Company of Florida (hereinafter American Bankers), to remit a bond in the amount

of $75,000.00 on which a judgment was entered against the defendants when in July, 1987, the defendant, George Lee Kosko (hereinafter Kosko), failed to comply with the terms of release previously ordered by the court.

Kosko's disappearance resulted in much delay and several unsuccessful government attempts to recapture the fugitive. In December, 1987, the court ordered Kosko's trial in absentia. Kosko turned himself into the custody of the United States on January 24, 1988, the day before his trial was scheduled to begin. On February 3, 1988, the defendants filed a motion asking the court to refund the bond on which judgment had been entered in July 1987.

Fed.R.Crim.P. 46(e) provides for the forfeiture and remission of bail when the terms of release are not complied with.

Such determinations are entrusted to the discretion of the trial court. United States v. Kirkman, 426 F.2d 747, 751 (4th Cir. 1970)(citations omitted).

In considering the defendants' motion the court has considered several different factors including: 1) the relation between the amount of the bond, and the government's expenses incurred both in pursuing Kosko and in delaying the trial,[1] 2) the willfulness of the breach of the terms of custody, 3) the participation of the bondsman in re-arresting the fugitive,[2] and 4) the more than technical nature of the breach, in which case a court can order substantial

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[1] Jeffers v. United States, 588 F.2d 425, 427 (4th Cir. 1978) citing Kirkman, 426 F.2d 752.

[2] United States v. Mizani, 605 F.2d 739, 740 (4th Cir. 1979) citing United States v. Nell, 515 F.2d 1351, 1353 (D.C. Cir. 1975).

forfeiture to deter the defendant and others from future violations.[3]

In the case at bar, Kosko's absence caused the government great inconvenience. The trial was postponed for a long time while the government tried unsuccessfully to apprehend Kosko. It was not until the court's patience had been exhausted, and the trial had been scheduled to proceed in Kosko's absence, that the defendant turned himself in. It is clear to the court that Kosko's absence was willful and flagrant. Although the court heard testimony that the bondsman made an effort to retrieve Kosko, he was not successful, and his efforts do not outweigh the inconvenience and expense incurred by the government.

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[3] Jeffers, 588 F.2d at 427, citing United States v. Aguecci, 379 F.2d 277, 278 (2d Cir. 1967).

The court also refuses to remit any part of the bond to signify its determination that terms of release are serious matters of public safety, and the court will not tolerate a flaunting of its authority.

For the above stated reasons, the defendant's motion is denied.

DATED: This 28th day of March, 1988.

/S
Chief U. S. District Judge

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA by ROBERT D. ROBERTS (Power of Attorney), Surety, Defendant-Appellant, and GEORGE LEE KOSKO, Defendant.	No. 89-6818

Appeal from the United States
District Court
for the Western District of Virginia,
at Roanoke.
James C. Turk, Chief District Judge.
(CR-87-48-R)

Argued: December 6, 1990

Decided: August 19, 1991

Before PHILLIPS, MURNAGHAN, and

SPROUSE, Circuit Judges.

Affirmed by unpublished
per curiam opinion.

COUNSEL

ARGUED: Harry Franklin Bosen, Jr., HARRY F. BOSEN, JR., P.C., Salem, Virginia, for Appellant, Jean Martel Barrett, Assistant United States Attorney, Roanoke, Virginia, for Appellee. **ON BRIEF:** John P. Alderman, United States Attorney, Morgan E. Scott, Jr., Assistant United States Attorney, Roanoke, Virginia, for Appellee.

OPINION

PER CURIAM:

American Bankers Insurance Company, as principal, through Roger D. Roberts, surety, appeals from the judgment of the district court denying its motion for bond refund under Rule 46(e)(4) of the

Federal Rules of Criminal Procedure. Finding no abuse of discretion in the court's order, we affirm.

I

George Lee Kosko was arrested for drug-related crimes in violation of 21 U.S.C. § 841(a)(1) and was released on a $75,000 corporate surety bond provided by American Bankers acting through its agent, Roger D. Roberts. Kosko was later indicted and was released pending trial on the same bond. An agreement between Roberts and American Bankers required Roberts to indemnify American Bankers for any forfeiture losses on such surety bonds.

While awaiting trial, Kosko violated the terms of his release by failing to report to his probation officer. He later disappeared. The district court

entered judgment against American Bankers and ordered payment to the United States in the amount of $75,000. Roberts paid $50,000 from his personal assets and borrowed another $25,000 from American Bankers' general agent. All but $742 in interest was paid.

The trial was postponed for several months while attempts were made to apprehend Kosko. Eventually, the court ordered that Kosko be tried in absentia. One day before the trial was to begin, Kosko turned himself in. He was eventually tried and his conviction was upheld on appeal. United States v. Kosko, 870 F.2d 162 (4th Cir. 1989).

American Bankers filed a motion for refund of the bond, which after a hearing, was denied. It subsequently filed a motion to reconsider and rehear, which was also denied. On appeal, American

Bankers contests the district court's refusal to remit any of the bond money, alleging that such refusal was arbitrary and capricious and an abuse of discretion. It contends that the court did not properly weigh the relevant factors in deciding not to refund the money. American Bankers argues that, applying the facts of this case to principles previously expressed by this Court, remission is warranted. It also asserts that remarks made by the trial judge at the hearing evince bias and partiality against bonding companies. We are not persuaded, and affirm.

II.

We first consider appellant's contention that comments made by the trial judge at the second hearing both demonstrate prejudicial bias and constitute

compelling evidence that his refusal to remit any of the amount of the forfeiture was arbitrary and capricious. The court's comments were expressed in a colloquy between the court and counsel for American Bankers concerning the consideration that ought to be given to the public service aspect of a commercial bonding company's participation in the criminal justice system:

> MR. BOSEN (Counsel for American Bankers): . . . And while a bondsman takes a risk, he also performs a public service to the court in allowing a defendant who is presumed to be innocent to be out of jail to cooperate with his attorneys and prepare his case. It does perform a service to the court. It's unfortunate that in this case--
>
> THE COURT: But I don't look on it as a service. Maybe I'm prejudiced against these bonding companies because it's these people that can't afford to pay these sums that get hooked with these bonding companies. The people with wealth, they don't need a bonding company. It's these people that really can't afford to pay and I've just seen it not with

Mr. Roberts only, but time and time again.

And these people, they put their family through all this ordeal of sacrificing and raising ten percent (10%) of it everytime [sic] and then these bondsmen, they turn around and, most of them, and get all the surety on the thing to protect them. I have no sympathy for these bondsmen at all and if I could get them out of this court, they wouldn't be in this court at all. If I could. So, I mean you can talk about the service they perform, but I think they are an evil on society. That's my opinion.

* * *

THE COURT: Well, I try to let as many of them out as I possibly can --

MR. BOSEN: Well, I understand, Judge.

THE COURT:--You know, before trial. But I just never like the proposition of, you know, fixing a bond at this and then the family--the person never can pay it. Somebody has to pay this premium. I just don't like it and you are not going to convince me otherwise, but go ahead. I mean--so he's not going to get it back on that reason that he's--he may get it back, but not because that [sic] he's doing a valuable service for the public.

Appellant argues that these comments demonstrate the district court was attempting to punish American Bankers. At the least, it argues, the judge's expressed attitude toward commercial bonding companies makes it improbable that he could have engaged in an impartial balancing of equities.

Claims of bias on the part of a trial judge are, of course, to be reviewed under an objective standard. "The question is not whether or not the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial, might reasonably question his impartiality on the basis of all of the circumstances." Rice v. McKenzie, 581 F.2d 1114, 1116 (4th Cir. 1978) (interpreting 28 U.S.C. § 455(a)). See also, Liljeberg

v. Health Serv. Acquisition Corp., 486 U.S. 847, 860 (1988).

We do not endorse or approve the tenor of the remarks of the court below. We are concerned that it injected unfavorable general characterizations during a hearing where the issue of a bonding company's rights were [sic] under court determination. On balance, however, we are persuaded that the statements made by the trial judge were in direct response to American Bankers' attempt to project its business as a public service, a portrayal it presented as a factor favoring remission. Nowhere did the court state that it was refusing to consider the possibility of remission for any of the other reasons presented. Again, the generalization in the court's predicate remarks were [sic] unfortunate, but in concluding, it capsuled its mean-

ing " . . . he may get it back, but not because that [sic] he's doing a valuable service for the public." We find no fault with the disinclination to include a public service factor in the balancing process. Jeffers, 588 F.2d at 426; see also, United States v. Frias-Ramirez, 670 F.2d 849, 852 (9th Cir.), cert. denied, 459 U.S. 842 (1982) (citing United States v. Bass Bank, 573 F.2d 258, 260 (5th Cir. 1978)) (court considered whether sureties were professionals or family and friends of the defendant in deciding whether to order remission). Considering all of the remarks in their proper context, we conclude that in balancing the recognized factors affecting remission, vel non, the judge's impartiality would not reasonably be questioned.

III

Turning to the merits of the forfeiture issue, a district court is authorized to declare a forfeiture of bail if there is a breach of any condition of the bond. Fed. R. Crim. P. 46(e)(1). Moreover, a court has the discretion to set aside such forfeiture if a person released on bond is later returned to custody "or if it otherwise appears that justice does not require the forfeiture." Fed. R. Crim. P. 46(e)(2). In such cases, the court may remit all or part of the bond. Fed. R. Crim. P. 46(e)(4). A settled rule holds that it is within the "sound discretion" of the trial court to decide whether to order remission. At the same time, forfeiture should not be used to punish a defendant for his nonappearance, nor to enrich the government. United States v. Kirkman, 426 F.2d 747,

752 (4th Cir. 1970). The standard by which we review a court's exercise of this discretion is "whether justice requires the enforcement of the forfeiture." Id. at 751-52.

Applying these general principles, we do not feel the district court abused its discretion. It first noted that the amount of the bond bore a reasonable relationship to the costs of pursuing Kosko and delaying trial. This was an appropriate consideration. See Accredited Surety & Casualty Co. v. United States, 723 F.2d 368, 369-70 (4th Cir. 1983) (citing Jeffers, 588 F.2d at 427). The government did not submit a detailed accounting of the expenses it incurred as a result of Kosko's disappearance, but it estimated that the costs of trying to locate Kosko probably amounted to one-third

of the forfeiture. The district court found that the amount was "substantial."

The court also properly gave weight to the willfulness of Kosko's breach of the conditions of the bond. See Jeffers, 588 F.2d at 426. The testimony established that during the time he was a fugitive, Kosko remained in contact with his privately-retained attorney, indicating a concerted attempt to evade the authorities. At the very least, this fact is probative of his awareness of the proceedings against him.

The court also properly considered the obvious fact that Kosko's fleeing was not merely a technical breach of the terms of the bond, the need to deter future violations, and the desirability to emphasize the serious nature of such bonds. See Accredited Surety & Casualty, 723 F.2d at 370.

The testimony reveals that Roberts made two trips to Florida in an attempt to locate Kosko, and that he fully cooperated with the authorities in their efforts. Importantly, however, the district court concluded that Roberts's efforts, while laudable, did not outweigh the cost and inconvenience to the government. See United States v. Mizani, 605 F.2d 739 (4th Cir. 1979).

In our view, the district court properly considered all the underlying equities and balanced them and the role that bail performs in administering the criminal justice system. Having done so, we conclude that it acted within its discretion in enforcing the full amount of the forfeiture.

IV

For the foregoing reasons, we affirm the judgment of the district court denying appellant's motion for remission of the bond.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
September 16, 1991

No. 89-6818

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA by Roger D. Roberts (Power of Attorney), Surety

Defendant-Appellant

and

GEORGE LEE KOSKO

Defendant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Appellant filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a

poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Sprouse, with the concurrence of Judge Phillips and Judge Murnaghan.

For the Court,

_____/S
CLERK

EXCERPT FROM TRANSCRIPT
OF JULY 14, 1989 HEARING

[Transcript page 19] MR. BOSEN: . . . And while a bondsman takes a risk, he also performs a public service to the court in allowing a defendant who is presumed to be innocent to be out of jail to cooperate with his attorneys and prepare his case. It does perform a service to the court. Its unfortunate that in this case--

THE COURT: But I don't look on it as a service. Maybe I'm prejudiced against these bonding companies because it's these people that can't afford to pay these sums that get hooked with these bonding companies. The people with wealth, they don't need a bonding company. It's these people that really can't afford to pay and I've just seen it, not with Mr. Roberts only, but time and time again.

And these people, they put their family through all this ordeal of sacrificing and raising ten percent (10%) of it everytime and then these bondsmen, they turn around and, most of them, and get all the surety on the thing to protect them. I have no sympathy for these bondsmen at all and if I could get them out of this court, they wouldn't be in this court at all. If I could. So, I mean you can talk about the [Transcript page 20] service they perform, but I think they are an evil on society. That's my opinion.